to shield small employers from the burdens of litigation – an intent that can be realized only through a jurisdictional understanding of numerosity.

Both this Court and the EEOC have consistently characterized numerosity as a jurisdictional requirement. The EEOC has done so in its (i) briefs to this Court, (ii) compliance manual, (iii) guidance documents, and (iv) adjudicative decisions. The point is not that this Court is bound by these prior characterizations; the point is that this Court and the EEOC have (up to now) always treated numerosity as jurisdictional because that is the best understanding of it.

None of Arbaugh's policy arguments against treating numerosity as a jurisdictional requirement is persuasive. And, notably, none of the concerns that Arbaugh raises has ever materialized in any significant way, notwithstanding the fact that for the better part of the last quarter century most courts have held numerosity to be jurisdictional.

ARGUMENT

"It is a principle of first importance that the federal courts are courts of limited jurisdiction." 13 C. Wright & A. Miller, *Federal Practice & Procedure* §3522, at 60 (2d ed. 1984). They "possess only that power authorized by Constitution and statute," and their authority may not be "expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "[I]t is to be presumed that a cause lies outside [a federal court's] limited jurisdiction," and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Accordingly, the question here, as Judge Sentelle has observed, is *not* whether Title VII expressly limits federal courts' subject-matter jurisdiction but, rather, whether Title VII expressly "*extends* the district court's jurisdiction to cases not involving the requisite number of employees." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 626 (D.C. Cir. 1997) (concurring opinion).

Subject-matter jurisdiction denotes a court's power – not so much its "physical power," as Justice Holmes once de-

scribed it, *McDonald v. Mabee*, 243 U.S. 90, 91 (1917), but rather, as this Court has more recently clarified, its legitimate "adjudicatory authority," *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *accord, e.g., Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 778 (2000); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). Specifically, this Court has said, "the label 'jurisdictional'" applies not to "claim-processing rules" or rules of "practice and procedure" but, instead, to prescriptions that delineate "the classes of cases ... falling within a court's adjudicatory authority," *Kontrick*, 540 U.S. at 453, 455, or, alternatively, the "cases ... courts are competent to adjudicate," *Scarborough v. Principi*, 541 U.S. 401, 414 (2004).

The question in this case, therefore, is whether Congress actually meant to give federal courts the *authority* to adjudicate Title VII suits against employers with fewer than 15 employees. The answer to that question - which this Court has said requires practical "deductions which may be drawn from [the applicable] congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts," *Aldinger v. Howard*, 427 U.S. 1, 17 (1976) - is plainly no. And no formalism concerning, for instance, the placement of the 15-employee threshold in one provision of Title VII as opposed to another (*see infra* at 11-13) can change that real-world assessment. In fact, as we will explain, the best evidence of congressional intent combines with potent practical considerations to support a jurisdictional understanding of the numerosity requirement.

* * *

Before delving into the guts of the interpretive question here, it will be useful to set the stage briefly. What, exactly, rides on the question presented? As a practical matter, the Court's decision here will determine *who* decides the numerosity issue, and *when*. If, as Arbaugh argues, numerosity is just another element of a Title VII claim, then it, like other merits issues, is presumptively an issue for the jury. Simply by alleging numerosity, a plaintiff can defeat a Rule 12(b)(6)

motion, and by raising any factual dispute he can defeat summary judgment and require a full-blown trial. If, by contrast, numerosity is a jurisdictional requirement, any litigation concerning that issue will be tried – ordinarily, at the very outset of litigation – to a judge alone, who can himself "resolve factual issues." 5B C. Wright & A. Miller, *Federal Practice & Procedure* §1350, at 160 & n.47 (3d ed. 2004).

With that in mind, consider this practical point: Unlike many other issues in a Title VII case – the resolution of which turns on dueling versions of events and debatable interpretations of motive – *employee numerosity an objectively verifiable fact*. It is susceptible of a single correct answer. At the end of the day, either an employer has 15 employees or it doesn't. Accordingly, for plaintiffs like Arbaugh, who sue employers that, in fact, have fewer than 15 employees, numerosity is a lose-lose proposition. A plaintiff in Arbaugh's shoes will either lose *early* or lose *late*.

Given that fact, what possible justification could there be for delaying the inevitable – for putting off the numerosity determination or sending it, along with other case-specific merits questions, to a jury? Judicial efficiency, by contrast, would seem to dictate resolving the question at the earliest possible juncture. There are, to be sure, reasons why Title VII plaintiffs might prefer delay, but none of them seems particularly compelling, or even legitimate. One, of course, is to allow an employee to scoop up a windfall in the event (as happened here) that a small employer's trial attorney simply forgets to raise the issue. But that isn't much of a reason; by virtue of an attorney's oversight, a plaintiff is loosed to sue and recover from the very kind of defendant that Congress sought to protect against suit and recovery.

Another reason plaintiffs might prefer to postpone the numerosity determination is that they know – as did Congress – that many small employers simply cannot afford to incur the costs of litigating a Title VII case. Accordingly, if a plaintiff can avoid an early numerosity-based dismissal by jumbling the numerosity issue together with fact-specific

merits issues – thus pushing it deeper into the case – he will be well-positioned strategically to coerce a favorable settlement from his cash-strapped adversary. But, there again, the very object is to get money from a defendant whom Congress knew couldn't afford it and for that reason expressly exempted from Title VII's coverage.

Finally, Title VII plaintiffs would almost certainly rather have juries than judges deciding the numerosity issue. The reason, as summarized in a law review article that Arbaugh cites, is because "[w]hether a judge or a jury decides the facts in question will frequently determine the outcome of the case" – and, more specifically, because "a jury might be expected to be more sympathetic to a plaintiff on close calls, especially" where the allegations of discrimination are "egregious." Stefania A. Di Trolio, Comment, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 Seton Hall L. Rev. 1247, 1250 (2003). But that, with respect, is really just an argument for jury nullification. The premise – which may well be accurate as a sociological matter, which is what concerns us – is that juries will allow the salaciousness of the allegations to color their view of employee numerosity in "close cases," and will fudge numerosity if necessary to punish bad behavior. But numerosity is a stand-alone exemption from Title VII; if an employer does not have 15 employees, then it has "complete [Title VII] immunity," *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), no matter how objectionable its alleged actions.

We will return in due course to answer Arbaugh's policy-based objections to treating numerosity as jurisdictional. The point here is that there seems to be no compelling affirmative justification for Arbaugh's contrary characterization of numerosity as a garden-variety merits issue to be decided deep in a case by a jury.

I. The Text and Structure of Title VII Demonstrate That Employee Numerosity Is Jurisdictional.

The substantive provision of Title VII at issue here, §703(a), titled "*Employer* practices," provides that –

> It shall be an unlawful employment practice for an *employer* -
>
> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a) (emphasis added). Textual and structural considerations demonstrate that §703(a)'s triggering condition - a defendant's "employer" status - is not just a garden-variety merits issue but is indeed jurisdictional in character.

A. Numerosity Is a Necessary Precondition to Title VII's Applicability and Is Thus Categorically Different From Ordinary Merits Issues.

Section 703(a) states a prohibition on "discriminat[ion]" "because of" certain protected characteristics. But as the preambular clause makes plain, the triggering condition for the application of §703(a)'s substantive antidiscrimination rule is the defendant's "employer" status. That is, if the defendant is not an "employer" within the meaning of Title VII, §703(a) *does not apply at all* - no matter how horrendous the alleged mistreatment or how transparent the motives for it. So, before one gets into the particulars of an individual's discrimination claim - and all of the various plaintiff-specific inquiries analysis of that claim will entail - there is an antecedent question, one that has absolutely nothing to do with plaintiff's substantive allegations: Is the defendant a Title VII "employer"? If not, the specifics of and reasons for the plaintiff's alleged mistreatment are positively irrelevant.

Section 701(b) defines the term "employer" for Title VII purposes. As relevant here, that section states that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks

in the current or preceding calendar year." 42 U.S.C. §2000e(b). Accordingly, if a defendant does not have at least 15 employees, it is not a statutory "employer" and Title VII, again, *does not apply at all*. As this Court has explained, in §701(b) Congress "expressly exempted ... small businesses" from Title VII and thereby gave them "complete immunity" from suit. *Hishon*, 467 U.S. at 78 & n.11.

Up to this point, all here seemingly agree: If a defendant does not have 15 employees, Title VII does not "appl[y]" at all and, correlatively, the defendant simply is not "covered" by or "subject to" Title VII. *See, e.g.*, Arbaugh Br. 7, 15, 16, 17, 18; Pet. at 5, 6 n.5. Indeed, the Question Presented itself recognizes that "Section 701(b) ... *applies* the Title VII prohibition against employment discrimination" set forth in §703(a) only "to employers with fifteen or more employees." Pet. at i (emphasis added). For three reasons, however, Arbaugh and her amicus argue that not even Title VII's categorical inapplicability to employers with fewer than 15 employees – and those employers' "complete immunity" from suit – suffices to make employee numerosity a jurisdictional rule. We consider those arguments in turn.

B. Where a Federal Statute Is by Its Plain Terms Categorically Inapplicable, Jurisdiction Is Lacking.

While not disputing that if an employer has fewer than 15 employees Title VII is categorically inapplicable, the Government cites a handful of decisions that it says suggest that the question whether a statute "applies," or whether a defendant is "subject to" suit, does not implicate subject-matter jurisdiction. With respect, the Government is wrong.

1. In arguing that a particular defendant's categorical immunity from suit does not affect subject-matter jurisdiction, the Government invokes *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), which it says indicates that "whether a defendant is a 'person' subject to suit under 42 U.S.C. 1983 is not a question of subject matter jurisdiction under 28 U.S.C. 1331." U.S. Br. 21. But on that score *Mt. Healthy* is ambiguous, at best. And in fact, particularly when

read in the context of the cases that immediately preceded it, *Mt. Healthy* seems to point in exactly the opposite direction. Specifically, the Court in *Mt. Healthy* noted that "if this were a §1983 action, brought under the special jurisdictional provision of 28 U.S.C. §1343 ... it would be appropriate for this Court to inquire, *for jurisdictional purposes*, whether a statutory action had in fact been alleged." *Id.* at 278-79 (emphasis added). For that proposition, the Court cited its earlier decision in *City of Kenosha v. Bruno*, which, addressing the question of subject-matter jurisdiction sua sponte, squarely held that because (at that time) a city was not a "person" within the meaning of §1983's substantive cause of action, a district court was "wrong in concluding that it had jurisdiction" of a plaintiff's §1983 claim "under §1343." 412 U.S. 507, 513 (1973). The moral seems clear enough: Where a defendant is *categorically* exempt from suit under a substantive statute, subject-matter jurisdiction (even when invoked under a separate jurisdictional provision) is lacking.

Aldinger v. Howard, 427 U.S. 1, is to precisely the same effect. There, again, this Court held squarely that because counties were not "person[s]" within the meaning of §1983's cause of action, district courts lacked subject-matter jurisdiction over them under §1343. *See id.* at 17 ("Congress excluded [counties] from liability in §1983, and therefore by reference in the grant of jurisdiction under §1343(3)."). The Court in *Aldinger* sensibly - and with an eye toward real-world functionality - held that interpretations of jurisdictional grants should be based *not* on rote formalism but, rather, on "deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts." *Id.* at 16-17. Somewhat more specifically, the Court held that "the reach of [a] statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress." *Id.* at 17.

The significance for the present case of the *Kenosha-*

Aldinger-Mt. Healthy line of reasoning[1] is plain. As was the case there, the Court is faced here with a formal jurisdictional provision (§706(f)(3)) that is separate from - and does not in so many words mention - the provision (§701(b)) that categorically exempts an identifiable class of defendants from statutory coverage. Here, as there, the Court should approach that question realistically, not formalistically, and hold that there is no jurisdiction over defendants that enjoy "complete immunity," *Hishon*, 467 U.S. at 78, from suit.

2. The Government also points to two decisions dealing with the question "whether the Jones Act applies to actions by alien seamen against foreign defendants." U.S. Br. 21 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and *Lauritzen v. Larsen*, 345 U.S. 571 (1953)). But *Romero* and *Lauritzen* are distinguishable in a critical respect. The Jones Act on its own broad terms *plainly* applied to the foreign seamen's claims; the Court expressly acknowledged as much. *See Lauritzen*, 345 U.S. at 576. The question there was whether the Court should read an applicability limitation into the language Congress had prescribed. Here, by contrast, the applicability limitation is patent on the face of the statute; by Congress' own directive, if an employer does not have 15 employees, Title VII does not apply, period. The only question here is whether, on the facts of a given case, Congress' specified limitation is met. Whether it is Congress itself (as here) or a court (as in the Jones Act cases) that fashions the applicability limitation matters, of course, for a fundamental reason: It is *Congress* that defines courts' subject-matter jurisdiction. *See Palmore v. United States*, 411 U.S. 389,

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[1] *See also ExxonMobil v. Allapatah Servs., Inc.*, 125 S. Ct. 2611, 2619 (2005) ("Congress, in enacting §1343(3), had declined (albeit implicitly) to extend federal jurisdiction over any party who could not be sued under the federal civil rights statutes."); *Finley v. United States*, 490 U.S. 545, 573 (1989) ("Congress' exclusion of municipal corporations from the definition of persons under §1983 ... evinced an intent to preclude the exercise of federal-court jurisdiction over them.").

400-01 (1973). And, indeed, in these kinds of cases – where a "shall not apply" condition is clear on the face of a statute – courts have quite sensibly treated categorical inapplicability as running to jurisdiction. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 795-97 & n.22 (1993) (Sherman Act); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 947-48 (7th Cir. 2003) (en banc) (same).

C. The Placement of the Numerosity Requirement in the "Definitions" Provision Does Not Diminish Its Jurisdictional Character.

Arbaugh also contends that employee numerosity cannot possibly be a jurisdictional requirement because it does not appear within the four corners of §706(f)(3) of Title VII, which formally assigns district courts "jurisdiction of actions brought under this subchapter." 42 U.S.C. §2000e-5(f)(3). Because, Arbaugh says, §706(f)(3) itself "contains no limitation based on the number of a defendant's employees," employee numerosity is not a jurisdictional prerequisite. Arbaugh Br. 13. But that argument proves entirely too much, as Arbaugh's own brief makes clear. Just as §706(f)(3) does not in so many words limit jurisdiction based on the number of a defendant's employees, it also (as Arbaugh quite rightly points out) does not itself "limit[] jurisdiction to actions against employers or any other type of defendant." Arbaugh Br. 7. Thus, under Arbaugh's reading, Title VII – which is titled "Equal *Employment* Opportunity"[2] and which targets "Unlawful *employment* practices"[3] – confers subject-matter jurisdiction over actions not only against tiny employers but against *non-employers*, as well. That acontextual reading of §706(f)(3) – in splendid isolation from everything else around it – cannot possibly be correct.

Arbaugh claims that *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), supports her position that in order to be

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[2] Pub. L. No. 88-352, 78 Stat. 253 (1964).

[3] 42 U.S.C. §§2000e-2, 2000e-3(a).

truly jurisdictional a requirement must necessarily appear in a statute's denominated-as-such jurisdictional provision. And at first blush, *Zipes* would appear to give Arbaugh some aid. The Court there held that Title VII's requirement that a complainant file his EEOC charge within 180 days, 42 U.S.C. §2000e-5(a), "is not a jurisdictional prerequisite to suit in federal court" but, instead, operates like a statute of limitations and is thus subject to waiver. *Id.* at 393. The Court did so, in part, on the basis that §706(f)(3) "contains no reference to the timely-filing requirement" and that "[t]he provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, [which] does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 393-94.

Zipes, however, is distinguishable on two (related) bases. First, the Court there found that the legislative history clearly showed that Congress intended Title VII's timely-filing requirement to "operate as a statute of limitations instead of a jurisdictional requirement." 455 U.S. at 394. And as the EEOC emphasized in its brief in that case, it is a principle "deeply embedded in our jurisprudence" that a statute of limitations is not jurisdictional but is instead a waivable procedural defense. Br. for EEOC at 12, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (Nos. 78-1545, 80-951). In that situation, where history and tradition decisively indicate that a particular requirement is *not* jurisdictional, it makes sense to require a heightened showing of congressional intent to the contrary. The numerosity requirement, however, is not weighed down by the same historical baggage.

Second, *Zipes* is distinguishable because the timely-filing requirement at issue there had absolutely nothing to do with the substantive scope of Title VII; it was merely a procedural, agency-housekeeping rule. Section 701(b)'s employer-numerosity requirement, by contrast, pertains precisely to Title VII's substantive scope. If an employer has fewer than 15 employees, Title VII does not apply at all and the employer has "complete immunity" from suit. *Hishon*, 467 U.S. at 78. *Zipes* and this case therefore occupy opposite

poles of the dichotomy sketched out by this Court in *Kontrick v. Ryan* and *Scarborough v. Principi*, both of which addressed claims that timely-filing rules were jurisdictional: "[T]he label 'jurisdictional'" applies not to "claim-processing rules" or rules of "practice and procedure" but, instead, to prescriptions that delineate "the classes of cases ... falling within a court's adjudicatory authority," *Kontrick*, 540 U.S. at 453, 455, or, alternatively, the "cases ... courts are competent to adjudicate," *Scarborough*, 541 U.S. at 414. *Zipes* is squarely in the former camp; this case is squarely in latter.

D. *Steel Co.* Does Not Support Petitioner's Merits-Based Understanding of Numerosity.

Finally, Arbaugh seeks to rely on language in *Steel Co. v. Citizens for a Better Environment* condemning statutory interpretations that would "mak[e] all the elements of [a] cause of action ... jurisdictional" or "turn every statutory question ... into a question of jurisdiction." 523 U.S. 83, 90, 92 (1998). It is of course true that the simple fact that a plaintiff's claim is a loser on the merits does not divest the courts of jurisdiction to hear it. But the *Steel Co.* argument is something of a red herring here. It depends on the premise that numerosity is just another garden-variety element of a Title VII claim – like proving that "discrimination" occurred and was undertaken "because of" some protected trait. If, the Government says, "the 15-employee requirement were jurisdictional, then every other required element of the plaintiff's case would presumably be jurisdictional as well ...." U.S. Br. 13.

But that deconstructionist argument – that if any statutory requirement is jurisdictional, they all must be – ignores the commonsense distinction between requirements that circumscribe Title VII's applicability in a writ-large sense and those that turn on the specifics of an individual plaintiff's treatment. Section 701(b)'s 15-employee threshold determines whether Title VII applies at all or whether, instead, the defendant is "complete[ly] immun[e]" from suit, *Hishon*, 467 U.S. at 78. Case-specific merits inquiries, by contrast, assume that Title VII applies and ask, in a writ-small sense,

whether a particular plaintiff suffered "discrimination" "because of" her race or sex. There is a very real – if intuitive – difference between a statutory coverage issue and an ordinary merits issue.

* * *

Arbaugh's formalistic arguments – that numerosity cannot be jurisdictional because Congress declined to put it in a jurisdictional clause, that if numerosity is jurisdictional so is every ordinary incident of a plaintiff's cause of action, etc. – are, with respect, part of an effort to evade a realistic appraisal of congressional intent. The question, again, is whether Congress *actually* "wanted to grant" courts authority to adjudicate Title VII suits against defendants with fewer than 15 employees. *Aldinger*, 427 U.S. at 17. Viewed through that real-world lens, the answer is no.

II. The Legislative History Confirms That Employee Numerosity Is Jurisdictional.

The Government's attempt to deal with Title VII's legislative history in two bulky footnotes (U.S. Br. 24 n.4, 28 n.6) is, with respect, unconvincing. In two important ways the legislative history strongly supports a jurisdictional understanding of Title VII's 15-employee threshold.

1. First, and most obviously, there is the proverbial smoking gun. As the Government itself acknowledges, the committee reports accompanying the 1972 amendments to Title VII, which lowered the numerosity requirement from 25 to 15, clearly and repeatedly refer to the requirement in "jurisdictional" terms. *See* H.R. Rep. No. 92-238, *reprinted at* 1972 U.S.C.C.A.N. 2137, 2142 (1972) ("extension of Title VII jurisdiction"); *id.* at 2155 ("changing the jurisdictional reach of Title VII"); *id.* at 2161 ("Jurisdiction"); S. Rep. No. 92-415, at 8 (1971) ("jurisdiction of the EEOC"); *id.* at 9 ("EEOC jurisdiction," "new jurisdictional area"); *id.* at 32 ("extension of jurisdiction"). Proponents and opponents of the change, alike, described the numerosity requirement that way. *See* H.R. Rep. No. 92-238, *supra*, at 2171 (minority views) ("addi-

tional jurisdiction bestowed on the EEOC"); *id.* at 2176 ("expansion of jurisdiction"); Subcomm. on Labor of the Comm. on Labor and Public Welfare, 3 *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1271 (1972) (hereinafter *1972 Legislative History*) (Allen) ("jurisdiction of the EEOC," "Commission's jurisdiction"). The Government dismisses these references as pertaining to Title VII's "coverage," which, it says, "seems" to be something different from jurisdiction. U.S. Br. 28 n.6. But as explained above, where, as here, an exemption from a statute's applicability is categorical, the coverage and jurisdictional inquiries converge.

2. More fundamentally, the legislative history underscores Congress' principal objective in imposing the numerosity requirement and thereby "exempting tiny employers from the antidiscrimination laws." *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.). Specifically, Congress' purpose, to which we have alluded already (*see supra* at 1, 2, 5, 6), was to "spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Id.*; *accord, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (purpose was to shield small employers from the "costs associated with defending against discrimination claims"); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) ("Congress did not want to burden small entities with the costs associated with litigating discrimination claims."). Indeed, that solicitude for small employers – and a desire to protect them from potentially bankrupting litigation costs – underlay both the original Act and the 1972 amendments. *See, e.g.*, 110 Cong. Rec. 13088 (1964) (Humphrey); *id.* at 13092 (Cotton); *id.* at 13092-93 (Morse); *1972 Legislative History*, *supra*, at 1274-79 (Stennis); *id.* at 1297-1301 (Fannin); *id.* at 1375 (Ervin).

Ultimately, both Arbaugh and the Government acknowledge that "the purpose of the employee-numerosity requirement is to protect small firms from the cost of litigation." Arbaugh Br. 18 n.21; *see also* U.S. Br. 24 n.4 (citing leg-

islative history). But they fail to come to grips with how – and to just what extent – this purpose favors a jurisdictional understanding of numerosity. Again, if, as Arbaugh would have it, numerosity were just another element of a Title VII cause of action, then it, like other merits issues, would presumptively be an issue for the jury. Merely by alleging numerosity, a plaintiff could defeat a Rule 12(b)(6) motion, and by raising any factual issue he could defeat summary judgment and require a full-scale trial. A small business would then be put to the burden of litigating numerosity – and in the process incurring potentially ruinous litigation costs – even if it ultimately turned out to have only 12, 13, or 14 employees. *That is precisely the scenario Congress sought to avoid.* By contrast, a jurisdictional understanding of numerosity would allow for resolution of the issue by a judge at the earliest possible juncture in the case, and would thus serve Congress' fundamental purpose of shielding small employers from the costs of litigation.

To put it simply: The *whole point* of the employee-numerosity requirement was to protect small employers from the burdens of litigation that they cannot afford. Petitioner's merits-based understanding would, in many cases, preclude early resolution of the numerosity issue and would thus routinely subject those very employers to protracted litigation. The incompatibility with Congress' clear and acknowledged intent could not be more stark.

III. Canons of Statutory Interpretation Indicate That Employee Numerosity Is Jurisdictional.

Inferences about the jurisdictional nature of Title VII's numerosity requirement may also be drawn from the nearly identical requirement in the Americans with Disabilities Act of 1990. In every relevant respect, the ADA is modeled expressly on Title VII. Like Title VII, the ADA defines the term "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year ...." 42 U.S.C. §12111(5)(A). The

ADA also explicitly incorporates Title VII's remedial scheme, including §706(f)(3)'s formal grant of jurisdiction. *See* 42 U.S.C. §12117(a). Congress' verbatim incorporation into the ADA of Title VII's numerosity and jurisdictional provisions is strong evidence of its intent that the former follow the latter, and, in fact, all here agree that the two should be read *in pari materia*.

Importantly, at the time the ADA was enacted in 1990, every federal court save one had expressly held Title VII's numerosity requirement to be jurisdictional. Specifically, the First,[4] Fifth,[5] Sixth,[6] Seventh,[7] Ninth,[8] Tenth,[9] and Eleventh[10] Circuits had all embraced a jurisdictional understanding; only the Third Circuit[11] had broken with the "orthodoxy" that "the minimum employee threshold cabined the federal courts' subject matter jurisdiction." Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. Chi. L. Rev. 1047, 1051 (2005). Given the backdrop against which Congress acted in 1990 - which also included the EEOC's then consistently held view that numerosity is jurisdictional, *see infra* at 23-25 - what this Court said in *Lorillard v. Pons* is

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[4] *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 635 (1st Cir. 1983).

[5] *See Dumas v. Town of Mount Vernon*, 612 F.2d 974, 976-77 (5th Cir. 1980).

[6] *See Armbruster v. Quinn*, 711 F.2d 1332, 1334 (6th Cir. 1983).

[7] *See Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 350 (7th Cir. 1983). The Seventh Circuit has since abandoned the jurisdictional understanding in favor of a merits-based reading. *See EEOC v. The Chicago Club*, 86 F.3d 1423, 1428-29 (7th Cir. 1996).

[8] *See Childs v. Local 18, Int'l Bhd. Of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983).

[9] *See Owens v. Rush*, 636 F.2d 283, 285-86 (10th Cir. 1980).

[10] *See McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987). Eleventh Circuit precedent on the question has since unsettled. *Compare Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1340-41 (11th Cir. 1999) (en banc) (Title VII, jurisdictional), *with Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (ADEA, merits).

[11] *See Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987).

precisely applicable: "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." 434 U.S. 575, 581 (1978). As in *Lorillard*, there is every reason here to conclude that in 1990 Congress implicitly endorsed a jurisdictional understanding of employee numerosity.

It is no answer to say that while the *Lorillard* canon may indicate that the *ADA's* numerosity requirement should be understood in jurisdictional terms, the same does not hold for *Title VII's*. First, as already noted, the statutes' definitional and jurisdiction-granting sections are identical. It would make no sense whatsoever to read them differently. Thus, inasmuch as *Lorillard* counsels a jurisdictional reading for ADA purposes, the same goes for Title VII. Second, this Court has been down this road before; its precedent shows that the ADA's incorporation of lower-court constructions of Title VII should be carried back to interpret Title VII itself. In holding in *Cannon v. University of Chicago* that Title IX entails an implied right of action, this Court looked to lower-court decisions construing Title VI in the years preceding Title IX's adoption in 1972. *See* 441 U.S. 677, 696-98 & nn.20-21 (1979). Then, in *Alexander v. Sandoval*, the Court circled back to Title VI; it took "as given" – on the basis of *Cannon's* earlier survey of lower-court Title VI precedent for the purpose of construing Title IX – that Title VI itself entails a private right of action. 532 U.S. 275, 279-80 (2001). Precisely the same mode of reasoning applies here.

IV. The Consistent Treatment of Employee Numerosity as Jurisdictional Has Validated Congress' Intent.

Through the years, both this Court and the EEOC have consistently treated the numerosity requirement as jurisdictional. To be clear, the suggestion here is *not* that this Court is bound by prior characterizations of employee numerosity as jurisdictional. These "jurisdictional rulings," if they can be called rulings at all, are most assuredly of the "drive-by"

variety, and thus have no particular "precedential effe .t." *Steel Co.*, 523 U.S. at 91. The point, instead, is that this Court and the EEOC have treated numerosity as a jurisdictional requirement *because that is how it has traditionally been understood.* And rightly so, inasmuch as it reflects Congress' considered judgment that, as a categorical matter, Title VII *does not apply at all* to employers with fewer than 15 employees.

A. This Court Has Consistently Treated Numerosity as a Jurisdictional Requirement.

1. In *EEOC v. Commercial Office Products Co.*, the Court stated straightforwardly that "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees ...." 486 U.S. 107, 119 n.5 (1988) (plurality opinion). The Government's chief response is that the statement addresses only the EEOC's "*administrative* jurisdiction[]," and "says nothing about the courts' subject matter jurisdiction, which was not at issue in the case." U.S. Br. 28. That's true, but the Government never explains why it should matter. The Third Circuit has also tried to make something of the court-agency distinction by asserting – conclusorily – that "Title VII's jurisdictional grant to the *federal courts* is broader." *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003). But is it? To be sure, the jurisdictional grant in §706(f)(3) is couched in broad terms: "Each United States district court ... shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. §2000e-5(f)(3). But so, too, is the EEOC's jurisdictional grant: "The Commission is empowered ... to prevent any person from engaging in any unlawful employment practice as set forth in ... this title." *Id.* §2000e-5(a). And why would Congress have assigned the EEOC and the courts *different* jurisdictions, given that both are integral (and integrated) parts of the same remedial scheme? The answer is that it wouldn't have. To the contrary, there is every reason to believe that what this Court said with respect to the EEOC's jurisdiction applies equally to courts' jurisdiction.

The point, in any event, is that, just like the courts, the

EEOC has (in §2000e-5(a)) a formal jurisdictional provision in Title VII. The statement in *Commercial Office* that "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees" shows that the numerosity requirement found in §701(b)'s definitional provision does indeed limit the scope of jurisdictional grants found later in the statute. And if it limits the EEOC's jurisdictional grant under in §2000e-5(a) – which does not use the term "employer" – there is no reason to think that it doesn't likewise limit the courts' grant under §706(f)(3).[12]

2. Again, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), the Court repeatedly referred to §701(b)'s definition of the term "employer" as a "jurisdictional" provision. *Id.* at 249, 251, 253.[13] But, the Government says, *Aramco* is distinguishable because (i) the question there was solely one of "legislative jurisdiction" rather than subject-matter jurisdiction, and (ii) "those are distinct inquiries." U.S. Br. 28. As for (i), it is not at all clear that *Aramco* dealt with legislative jurisdiction wholly apart from subject-matter jurisdiction. After all, as this Court itself noted, the district court there had dismissed the plaintiff's Title VII claim for lack of subject-matter jurisdiction under Rule 12(b)(1) and, *on that basis*, likewise dismissed the plaintiff's state-law claims for lack of pendent jurisdiction. *See* 499 U.S. at 247; *Boureslan v. Aramco*, 653 F. Supp. 629, 631 (S.D. Tex. 1987). This Court, having found that Title VII categorically did not apply to U.S. employers who employ U.S. citizens abroad, affirmed that subject-matter-jurisdiction dismissal. Precisely the same analysis applies here: Because Title VII categorically does not apply to employers with fewer than 15 employees, there

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[12] Notably, the Government's own brief in *Commercial Office* affirmed that "the Commission *lacks jurisdiction* under Title VII [where] the employer does not have 15 employees ...." Br. for Petitioner at 26-27, *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (No. 86-1696) (emphasis added).

[13] As in *Commercial Office*, the Court was following the EEOC's lead. *See* Br. for EEOC at 12, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (Nos. 89-1838, 89-1845) (§701's definitions are "jurisdictional provisions").

is no subject-matter jurisdiction.

As for (ii) – that legislative and subject-matter jurisdiction are entirely separate – the Government relies principally on the dissenting opinion in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 813 (1993). Without joining issue in that debate squarely, it is enough to note that the Court majority in *Hartford Fire* disagreed that only legislative, and not subject-matter, jurisdiction was at issue in that case. Rather, the Court's opinion indicates that the Sherman Act's substantial-effect-on-commerce requirement simultaneously implicates *both* legislative and subject-matter jurisdiction. *See* 509 U.S. at 796-98 & n.22.[14] Particularly given the district court's dismissal for lack of subject-matter jurisdiction – which this Court affirmed – there is every reason to think that the same was true in *Aramco*. In any event, the point, again, is that the Court in *Aramco* spoke of §701(b)'s definition of "employer" in jurisdictional terms – *i.e.*, as establishing a categorical, bright-line limit on Title VII's applicability.

3. Finally, in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), this Court dealt specifically with §701(b)'s numerosity requirement (and, more specifically still, with the proper manner of counting employees for purposes of measuring numerosity). The Government acknowledges that the lower courts had dealt with the case expressly on subject-matter jurisdiction grounds. *See* 519 U.S. at 205. The Government further acknowledges that after reversing the lower courts for failing to apply the "payroll method" of counting employees, this Court did *not* remand for a jury recount under the correct standard – as would have been appropriate were numerosity a merits issue – but instead counted employees itself. To the latter point, the Government responds that the parties there had "apparently" stipulated to "all relevant facts, leaving no fac-

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[14] *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 947-48 (7th Cir. 2003) (en banc) (so construing *Hartford Fire*); *see also McBee v. Delica, Ltd.*, 417 F.3d 107, 119-20 (1st Cir. 2005) (same, as to Lanham Act).

tual disputes for trier-of-fact to resolve on remand, regardless of whether the question was jurisdictional." U.S. Br. 27. In fact, however, this Court's opinion shows that the parties' stipulation was faulty; it "did not correspond precisely to the counting method" that the petitioners had advocated and the Court adopted. 519 U.S. at 212. In finding the facts for itself - and concluding that respondent was a Title VII "employer" - the Court thus had to go outside the parties' stipulation and make its own fresh calculation. It was justified in doing so *only* if numerosity is jurisdictional.

Given the point we are trying to make here - again, not that this Court has resolved the question presented but, rather, that this Court and the EEOC have routinely spoken of §701(b) in jurisdictional terms because that is the best understanding of it - there are two other points worth making about *Walters*. The first is simply that the EEOC's brief there (like its briefs in *Commercial Office* and *Aramco* and, as we shall see, like most all of its other documents, *see infra*) expressly referred to §701(b)'s 15-employee threshold as a "jurisdictional requirement." Brief for EEOC at 24 n.17, *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (Nos. 95-259, 95-779); *see also id.* at 6 (noting concession that under respondent's counting method "the court would lack jurisdiction"). The second is the way this Court plainly distinguished the numerosity requirement, which it called a "coverage determination," 519 U.S. at 210, from the ordinary elements of a Title VII claim. At the outset of its opinion, the Court noted that "[p]etitioners' suit rests on Title VII's antiretaliation provision, 42 U.S.C. §2000e-3(a), which makes it unlawful for an employer to discriminate against any of its employees for filing complaints of discrimination." But, the Court emphasized, contrasting the cause of action itself with the threshold numerosity issue, respondent was not "subject to Title VII" *at all* unless "it met the statutory definition of 'employer' ...." *Id.* at 205. Echoing the coverage-merits distinction that we have emphasized, *Walters* indicates that numerosity is indeed (as the EEOC itself said there) a categorical, "jurisdictional requirement."

B. The EEOC Has Consistently Treated Numerosity as a Jurisdictional Requirement.

Throughout the years - indeed, right up until its filing in this case - the EEOC has itself consistently referred, in every conceivable kind of document, to employee numerosity as a "jurisdictional" prerequisite. The EEOC's position here, therefore, is curious in that it "flatly contradicts the position which the agency had enunciated at an early date, closer to the enactment of the governing statute." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976); *see also Aramco*, 499 U.S. at 257; *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 93-94 (1973).

The EEOC has described the 15-employee threshold as a "jurisdictional" requirement not only in its briefs to this Court (*see supra* at 20, 22), but also in its compliance manual, in guidance documents, and in adjudicative decisions. The pre-2000 version of the EEOC's compliance manual devoted an entire section to the subject of "Title VII Jurisdiction." EEOC Compliance Manual, Section 605: Title VII Jurisdiction (CCH) ¶2101 *et seq.* (2000). That section states that "Title VII ... describes the types of employers ... covered by the Act" and that this is a "jurisdictional issue[]." *Id.* §605.1, ¶2102. In the same vein, the manual clearly provides that "[i]n order for the Commission to assert jurisdiction, respondent must be an employer within the meaning of §701(b) of Title VII." *Id.* §605.12, ¶2112. In answer to the question, "Does Respondent Employ 15 or More Employees?," the manual uses an example to show that "[t]he Commission would not have jurisdiction" over a charge filed against an employer that "did not employ 15 or more employees during each of 20 weeks." *Id.* §605.8(b), ¶2108. Finally, in keeping with the sharp jurisdiction-merits distinction, the manual emphasizes that "[a] determination on the jurisdictional issue will be made before a determination on the merits of the charge is made ...." *Id.* §605.1, ¶2101.[15] *See also* EEOC Compliance

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[15] Section 605 has been superseded by a new Section 2, titled "Threshold Issues." EEOC Compliance Manual, Section 2-I *et seq.* While new Section

Manual, Section 4.3(a) (titled "No jurisdiction"; "not enough employees/members" requires "jurisdiction dismissal"); *id.* §94, App. 94-A (A "charge is outside the jurisdiction of the EEOC [if] the employer ... has fewer than 15 employees.").

The EEOC's guidance documents are to the same effect. For instance, a 1990 policy guidance concerning the counting of part-time employees stated flatly that "[t]he requirement of fifteen or more employees is a jurisdictional prerequisite for Title VII coverage, while twenty or more employees is a jurisdictional prerequisite for ADEA coverage." Policy Guidance: Whether Part-Time Employees Are Employees Within the Meaning of §701(b) of Title VII and §11(b) of the ADEA, 1990 WL 1104704, at *1 (1990). In the same vein, a document issued in the wake of *Walters* offered guidance on counting employees to determine whether an employer "has a sufficient number of employees to satisfy the jurisdictional prerequisite for coverage under Title VII ...." Enforcement Guidance on *EEOC & Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997), 1997 WL 33159164, at *1 (1997); *see also id.* ("jurisdictional prerequisite for coverage"); *id.* at *2 ("jurisdictional prerequisite of 15 employees," "jurisdictional threshold[]"); *id.* at *4 ("jurisdictional prerequisite").

EEOC adjudicative decisions likewise have described numerosity as a jurisdictional requirement. *See, e.g.*, Decision No. 77-32, 1977 WL 5352, at *1 (1977) ("Respondent Employer is a retail establishment which employs more than fifteen employees and affects interstate commerce, and, as such, is subject to the jurisdiction of the Act under §701(b)."); Commission Decision on Coverage of Contraception, 2000

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2 does not use the language of "jurisdiction" specifically, it makes clear that the supersession of Section 605 (and presumably the change in terminology it entails) "does not indicate a change in Commission policy," *id.* §2-1 n.1, and it continues to differentiate sharply between coverage and merits determinations, noting that to be "covered under Title VII" *at all* an employer must have 15 employees, *id.* §2-III.B.1(a)(i), and, further, that this "threshold requirement" should be determined *"before* considering the merits of discrimination claims." *Id.* §2-I.

WL 33407187, at *1 (2000) (whether respondent is an "employer[] within the meaning of Section 701(b) of the Act" is a "jurisdictional requirement[]").

To repeat, the point is not that the EEOC is estopped from asserting its newfound position. The point is more basic: the EEOC has always understood and analyzed employee numerosity in jurisdictional terms *because that is the right way to understand and analyze it.* It squares with the real-world fact, known to all, that if an employer has fewer than 15 employees, Title VII *does not apply at all.* Employee numerosity, therefore, is, as the EEOC has repeatedly recognized, jurisdictional in the most basic sense.

V. Considerations of Sound Public Policy Counsel a Jurisdictional Understanding of Numerosity.

The numerosity requirement's jurisdictional character is confirmed by reference to the common-sense practicalities of the situation. The most salient practical point (highlighted above, *see supra* at 4-6) is that there is simply no good reason for putting off until trial the determination of numerosity, which, again, is typically an objectively verifiable, yes-or-no fact. Numerosity is, as we have said, a lose-lose proposition for a plaintiff, like Arbaugh, who sues a defendant that does not have 15 employees. Because such a defendant is "complete[ly] immun[e]" from suit, *Hishon*, 467 U.S. at 78, there is no basis for subjecting it to protracted litigation.

Arbaugh raises several policy-based arguments against treating numerosity as a jurisdictional requirement. None is persuasive – and confirmation lies in the fact that none of the problems Arbaugh imagines has ever materialized in any significant way, notwithstanding the fact that for the better part of the last quarter century most courts have held numerosity to be a jurisdictional requirement.

1. *The Incentive To Sandbag.* Arbaugh claims that a determination that the numerosity is jurisdictional will give Title VII defendants an affirmative incentive to sandbag. Defendants, she says, will hold back a known numerosity

defense, litigate the merits of the Title VII claim all the way through to conclusion with the hope of obtaining a favorable judgment with preclusive effect, and then, only if they lose on the merits, deploy the numerosity argument as a failsafe. *See* Arbaugh Br. 34-35 & n.56.

With all respect, it is worse than fantastical to think that an employer with fewer than 15 employees would have the financial wherewithal to play the games that Arbaugh imagines. We're not dealing with the *Fortune* 500 here, with fleets of high-paid lawyers scurrying around to close off every avenue. These are the "very small firms" that Congress concluded could not handle "the potentially crushing expense" of Title VII litigation in the first place. *Papa*, 166 F.3d at 940. A small employer's *only* incentive when faced with a Title VII suit is to make it go away as quickly as possible. That is not to say that there won't be cases, like this one, where a lawyer inadvertently fails to raise the issue – only that small employers have absolutely no tactical incentive to wait.

2. *Complex = Non-Jurisdictional.* Arbaugh argues that the numerosity issue "turns on complex factual issues" and, accordingly, is "inappropriate for a jurisdictional rule." Arbaugh Br. 8. There are three responses.

First, Arbaugh considerably overstates the difficulty of ascertaining numerosity. Although, as Arbaugh is quick to point out, this case required some discovery concerning the status of several workers, the typical case will require little (if anything) beyond a review of an employer's payroll records. And as Arbaugh herself acknowledges, this Court's decision in *Walters*, adopting the straightforward "payroll method" for counting employees, "somewhat simplif[ies]" the counting process. Arbaugh Br. 27. In any event, the point is that *relative to the merits issues that arise in a Title VII suit*, which as the Court knows can be quite complex, numerosity is remarkably clear-cut. As a matter of judicial economy, numerosity should be decided as early as possible in the litigation.

Second, even assuming that the numerosity inquiry may

require some analysis, Arbaugh has not explained the logical link between an issue's purported "complex[ity]" and its non-jurisdictional nature. Just last Term, this Court observed that "jurisdictional matters" are not always susceptible of easy up-or-down answers; rather, they "often necessitate judicial scrutiny." *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005). And while the Government (U.S. Br. 16) quotes *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999), for the proposition that "in most instances subject-matter jurisdiction will involve no arduous inquiry," the same decision recognizes that jurisdictional questions can be "difficult," *id.* at 577-78, 588, "formidable," *id.* at 581, and "novel," *id.* at 588; *accord Steel Co.*, 523 U.S. at 122 n.15 (Stevens, J., concurring in the judgment) ("difficult," "subtle," "complex"). Indeed, *the whole point* of both *Ruhrgas* and *Steel Co.* is that questions of subject-matter jurisdiction can be hard; those decisions determine whether difficult subject-matter jurisdiction issues may, in the interest of judicial economy, be bypassed in favor of comparatively simple personal jurisdiction or the merits inquiries.

Finally, Arbaugh never explains why, assuming the complexity she envisions, it would be preferable to let *lay juries* decide numerosity questions. If, as Arbaugh claims, it would be awkward and unwieldy for judges to have to "dig through" "pay stubs and time sheets," *Nesbit*, 347 F.3d at 83, how much more awkward and unwieldy would it be to foist that responsibility on juries? Juries exist principally to make credibility determinations and to resolve he-said-she-said conflicts; numerosity rarely if ever will turn on those sorts of judgments. *See* Mandell, *supra*, at 1064 & n.100. Accordingly, to the extent that numerosity *is* complex, it is complex in a way that carries it outside the jury's wheelhouse; institutional considerations thus counsel having judges, not juries, decide it.

3. *Sua Sponte Consideration.* Arbaugh contends that if employee numerosity is jurisdictional, courts will be obliged to inquire into the issue sua sponte but that they will "rarely have available the detailed information needed to ascertain

whether that requirement was met, or even that a problem might exist." Arbaugh Br. 32. The problem Arbaugh posits is hypothetical; it will not arise in the real world. As Arbaugh herself concedes, the problem won't come up if "one of the parties ha[s] already offered substantial relevant evidence." *Id.* at 9. And it is inconceivable that in the wake of a definitive determination that numerosity is jurisdictional, one (or both) of the parties won't do just that. After all, if numerosity is jurisdictional, then a Title VII plaintiff will have the burden, at least initially, of establishing it. *See Kokkonen*, 511 U.S. at 377. He could presumably discharge that burden – and thereby put the court on notice whether a numerosity question lurks – by attaching his EEOC charge, which, as Arbaugh herself notes, must "state the number of employees who worked for the employer." Arbaugh Br. 27 n.42 (citing 29 C.F.R. §1601.12(a)(4)). The employer defendant, of course, will have every incentive to respond with a motion to dismiss supported by pertinent documentation.

The point is that in the real world district courts will almost inevitably have some idea from the initial pleadings – and quite probably from the complaint alone – whether numerosity is at issue. They may then undertake whatever brief investigation is necessary to determine whether the 15-employee threshold has been met.

4. *The Ease of Addressing Other Issues First.* Arbaugh argues that if the numerosity issue is jurisdictional courts will be required to address it first "even though other, less difficult grounds for a decision on the merits might be evident." Arbaugh Br. 32. The implication, of course, is that courts shouldn't be put to the trouble. But that, with respect, is just an argument for not taking *Steel Co.* seriously. *Steel Co.* teaches that if an issue is jurisdictional, it must be dealt with first, even if simpler issues are in the offing. The logic doesn't run in the other direction – that if simpler solutions are available, an issue should be deemed non-jurisdictional.

In any event, the benefit that Arbaugh suggests – being able to bypass numerosity to resolve the case on some easier

ground - is illusory. The benefit of reclassifying numerosity as a merits issue would be real only where some substantive element of the Title VII claim were *obviously and plainly* lacking. But, again, the merits questions in a typical Title VII case - Was this "discrimination"? Was it "because of" sex? - are notoriously fact-intensive. None is likely to be particularly straightforward in the sense Arbaugh imagines. Indeed, the only example that Arbaugh musters - of determining "whether an administrative charge had been filed within the applicable deadline following the alleged discriminatory act" (Arbaugh Br. 33) - would not have saved an ounce of judicial effort in this case; there was never a question whether Arbaugh's EEOC charge was timely. The point is that even if numerosity were a merits question, a court would almost inevitably have to confront it eventually. *See* Mandell, *supra*, at 1071-72.

5. *Burdening State Courts with Federal Rules.* Arbaugh asserts that if numerosity is truly jurisdictional, then it is jurisdictional with respect to Title VII claims brought in state courts, as well, and, therefore, that "state courts hearing Title VII claims would themselves have to follow in this regard the often wasteful and burdensome procedures applicable to federal jurisdictional rules." Arbaugh Br. 26. Arbaugh cites no support for that proposition and, with respect, she is simply wrong about it. The "wasteful and burdensome procedures" to which Arbaugh presumably refers - *Steel Co.*, sua sponte consideration, etc. - all result directly from the uniqueness of *federal* courts as courts of limited jurisdiction. *See Steel Co.*, 523 U.S. at 94-95; 13 Wright & Miller, *supra*, §3522, at 69-72. By contrast, "[m]ost state courts are courts of general jurisdiction ...." *Id.* §3522, at 60. Accordingly, the rationale underlying the rules to which Arbaugh objects simply doesn't apply in state courts. A state court faced with a numerosity-based "jurisdictional" issue, therefore, can approach and dispose of it however it wants, in accordance with applicable state procedural rules. It may, of course, choose to raise it sua sponte and address it first in the manner of *Steel Co.* But it is by no means *obliged* to do so.

6. *The Specter of Strategic Firings.* The Government floats one last policy argument for treating numerosity as an ordinary merits issue. If, it says, numerosity is jurisdictional, then it will need to be measured at the time the suit is filed, rather than when the challenged conduct allegedly occurred. And from that state of affairs, the argument goes, small employers will derive an incentive to "eliminate potential liabilities simply by reducing their workforce" – *i.e.*, by firing workers in order to squeeze in under the 15-employee threshold. U.S. Br. 19.

The argument is far-fetched. It requires one to assume that an employer would, on the heels of what might (or might not) constitute actionable behavior, fire an employee (or two, or five) solely in order to stave off a potential, as-yet-unfiled Title VII suit – leaving itself subject, all the while, to suit under state law, which Arbaugh herself emphasizes is often more plaintiff-friendly anyway. *See* Arbaugh Br. 36 (state-law causes of action are typically not "dependent on a showing that the employer has fifteen employees" and "frequently provide[] more expansive remedies, involve[] less demanding standards of proof, or impose[] less stringent procedural barriers"). It is inconceivable that any rational small employer would fire even one employee – and thus subvert its entire business model – in order to achieve so Pyrrhic a victory.

7. *Other Remedies.* Finally, and relatedly, there can be no argument here that if the Court reaffirms the numerosity requirement's jurisdictional character, employees will be left out in the cold. As Arbaugh herself has emphasized, "thirty-five states and the District of Columbia have enacted anti-discrimination laws applicable to" employers with fewer than 15 employees, and "the conduct giving rise to a Title VII claim" will often "constitute a tort under state law." Arbaugh Br. 36. And as just noted, these state-law remedies are frequently more favorable to plaintiffs than Title VII.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,
D/B/A THE MOONLIGHT CAFE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 04-944

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,
D/B/A THE MOONLIGHT CAFE,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF AMICI CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or